Section 1692c(c)(2) interpreted by the Sixth Circuit in *Lewis*, is similar to Section 1692e(10) interpreted by the Fifth Circuit in *Goswami*, in that the broad language of both sections of the Act may prohibit collection activity which is not abusive. The Sixth Circuit in deciding that a technical violation of the Act cannot be supported in light of its purpose reasoned that punishing debt collectors for initiating settlement opportunities does not further the interest of the consumer that the FDCPA was designed to protect, as follows:

> While Congress appears to have intended the act to eliminate abusive collection practices, the language of § 1692c(c) is broader: it not only states that a debt collector may not make a demand for payment following a cease-communication letter, but also prohibits communication of any kind other than those falling within the three exceptions. Thus, at first glance, ACB's June 3rd letter does not appear to fall within the literal terms of § 1692c(c)(2) as a notice of remedy. A close look at the letter, however, shows that the letter can be construed as a type of settlement offer and that ACB normally invokes such a remedy. We believe that such a construction is warranted.
>
> We believe that Lewis's interpretation of § 1692c(c)(2), which would prohibit collectors from sending noncoercive settlement offers as a remedy, is 'plainly at variance with the policy of the legislation as a whole.' *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940). To hold that a debt collector cannot offer payment options as part of an effort to resolve an outstanding debt, possibly without litigation, would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance

> efforts to resolve the —debt – something that is clearly at odds with the language and purpose of the FDCPA. Nothing ACB did in its June 3rd letter can be construed as an abusive collection practice. It simply offered to settle Lewis's debt without litigation. Allowing debt collectors to send such a letter is not only consistent with the Act but also may result in resolution of the debt without resorting to litigation, saving all parties involved the needless cost and delay of litigation as is exemplified by this very case. And it is certainly less coercive and more protective of the interests of the debtor. Moreover, while ACB's letter could have more clearly expressed its character as a notice of a normally invoked remedy had it included other typically invoked remedies, such as filing a lawsuit, nothing in the statute requires that the letter give notice of all of the remedies normally invoked by debt collectors, and the statute does not require that a debt collector invoke any specific type of remedy. Rather, it allows the debt collector to notify the consumer of remedies *it* normally invokes. The record in this case clearly demonstrates that ACB did just that.[5]

The Sixth Circuit determined that it would not construe the FDCPA to punish non-coercive and non-abusive collection efforts that ultimately are a benefit to the debtor. The debtor in the case below was offered a settlement which was a discount on her uncontested debt. Under the reasoning of *Lewis v. ACB*, Cross Petitioner should not be penalized.

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[5] *Lewis* at 398-399.

Further at odds with the Fifth Circuit, the debtor plaintiff in *Lewis* argued that he should be entitled to discover the contract between ACB and American Express, the creditor, because it controlled ACB's collection activities and could lead to discovery of collection activities required of ACB but not followed. The Sixth Circuit affirmed the District Court, holding that the contract between AMEX and ACB would not be discoverable as follows:

> We also do not believe that the district court abused its discretion in finding that the [contract between the creditor and the debt collector] was not relevant to any of the issues remaining in the case. For one thing, Lewis never disputed that he owed the debt. And there was never any dispute that ACB had sent the [collection] letter. Thus, questions of whether ACB sent Lewis the letter pursuant to a contract with Amex or whether ACB acted outside the terms of any contract it may have had with Amex had no relevance to whether ACB's activities at issue in the Dayton case were a violation of the FDCPA or the OCSPA. Likewise, the statements made by employees of ACB at trial mentioning an agreement between ACB and Amex were simply made in passing and did not make the contract relevant to the issues in the Dayton case. These statements simply explained why Lewis's file was again sent to ACB after the suit was filed. Thus, the district court's denial of Lewis's motion to compel production of the contract between ACB and Amex was not an abuse of discretion.[6]

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[6] *Lewis* at 402-403 (footnote omitted).

Although the Sixth Circuit was interpreting a different section of the FDCPA than was considered by the Fifth Circuit in the case below, the Sixth Circuit did not look beyond the communications between collector and debtor to determine whether a violation of the FDCPA occurred. The determination of whether the settlement offer violates any provisions of the FDCPA must be limited to viewing the letter as a whole and without any considerations outside the four corners of the letter making the offer itself. In accordance with the Sixth Circuit, the settlement authority in a contract between ACEI and Capital One is not relevant to whether the correspondence violates the FDCPA.

B. The Fifth Circuit's Opinion in the Case Below

The Fifth Circuit held that an offer made by a collector on behalf of a creditor to settle an uncontested debt is a violation of the FDCPA if "[the collector] made false or misleading statements about the settlement authority it held from [the creditor] in the discount it was authorized to offer and the time within which [the debtor] was allowed to accept the offer." This broad pronouncement is in conflict with the Sixth Circuit's decision that the FDCPA must be construed in light of its purpose and that the underlying agreement between the creditor and the collector is not relevant.

The Fifth Circuit's decision is inconsistent with the Sixth Circuit's view that Congress intended the FDCPA to prevent only abusive collection practices. The Sixth Circuit interpreted section 1692c(c)(2) of the FDCPA in accordance with the purpose of the FDCPA as identified in section 1692, to restrict the broader language of section 1692c(c)(2) to acts which are abusive. By doing so the Sixth Circuit ruled that a "noncoercive settlement offer" would not violate the FDCPA. This ruling conflicts with the Fifth Circuit in that

the Fifth Circuit held that an offer to settle a debt, albeit available as stated but which does not reflect the creditor's authority, is a violation.

The Sixth Circuit's inclusion of the coercive or abusive element in determining whether a settlement offer violates the FDCPA is in accordance with the purpose of the FDCPA and in conflict with the Fifth Circuit's opinion below. Because of the conflicting opinions of the Circuit Courts of Appeals regarding proper interpretation of the text of the FDCPA and whether to consider the underlying agreement between creditor and collector in identifying possible violations of the FDCPA, this Court should grant this Cross-Petition for certiorari and resolve the conflict.

II. The Court of Appeals, by Not Interpreting the Language of 15 USC § 1692e(10) in Accordance with the Purpose of the Legislation as Required by this Court in *United States v. American Trucking Ass'ns* Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Powers

The Court of Appeals, by interpreting the FDCPA in a manner inconsistent with the clear purpose of the Act, has so far departed from the accepted and usual course of statutory construction that this Court should exercise its supervisory power to correct the error. The FDCPA was adopted to stop unscrupulous collectors from abusing debtors in the process of collecting debts. The purpose of the FDCPA is expressly described in the Act as follows:

(a) ***Abusive practices***

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. ***Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy***.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or ***other abusive debt collection practices*** are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate ***abusive debt collection practices by debt collectors***, to insure that those debt collectors who refrain from using abusive debt collection practices are not

> competitively disadvantaged, and to promote consistent State action to ***protect consumers against debt collection abuses.***

15 U.S.C. § 1692 (emphasis added).

A collector's letter that offers a benefit by reducing the amount owed is not abusive and does not rise to the level of deception necessary to support a violation of the FDCPA.

The Ninth Circuit in *Pressley v. Capital Credit & Collection Service, Inc.*, construed a technical violation of section 1692e(11) where a collector sent a follow up letter to a debtor asking for the same payment as previously requested. The Ninth Circuit recognized that in interpreting the language of the FDCPA, it is necessary to look to the purpose of the Act to determine if collection efforts that result in a technical violation of the statute are the type of collection efforts intended to be prohibited, stating as follows:

> In interpreting statutes, the Supreme Court has often recognized the rule 'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *E.g., United Steelworkers of America v. Weber,* 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979) (quoting *Holy Trinity Church v. United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)).
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> ...
>
> The purpose of the Act as explained by Senator Riegle (Michigan) 'is to protect consumers from a host of unfair, harassing, and deceptive debt collection

> practices without imposing unnecessary restrictions on ethical debt collectors.' 123 Cong.Rec.S. 27,386 (daily ed. Aug. 5, 1977). This stated purpose as set forth in the Committee Report was ordered printed in the Record. *Id.* at 27,387.
>
> In this case, we deal with a follow up notice which only demands a payment as earlier requested. Applying Pressley's interpretation, requiring the debt collector to make affirmative disclosures in this narrow type of follow up notice, would ignore the balancing mandated by Congress. We therefore hold that the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692e(11) must be made.

760 F.2d 922, 924-925 (9th Cir. 1985).

Similarly, as discussed above, the Sixth Circuit in *Lewis,* held that a demand letter offering settlement should not be construed as violating the FDCPA when the purpose of the Act is read in conjunction with the specific section alleged to have been technically violated:

> While Congress appears to have intended the act to eliminate abusive collection practices, the language of § 1692c(c) is broader: it not only states that a debt collector may not make a demand for payment following a cease-communication letter, but also prohibits communication of any kind other than those falling within the three exceptions.
> ...
>
> We believe that Lewis's interpretation of § 1692c(c)(2), which would prohibit collectors from

> sending noncoercive settlement offers as a remedy, is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940).[7]

The objective of the FDCPA, as stated in the statute itself, is to stop abusive practices that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). These examples of the negative societal impact of collection abuse should, without argument, be prevented. However, applying an interpretation to section 1692e(10) that does not take into consideration the Congressional purpose results in the Fifth Circuit's disapproval of collection efforts that benefit the debtor. This cannot be a proper interpretation.

The Fifth Circuit should follow this Court's mandate that when strict adherence to the words of a statute leads "to absurd or futile results," the Court should "look[ ] beyond the words to the purpose of the act." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940). Even "when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,'" the Court should "follow[ ] the purpose rather than the literal words." *Id.* Because the Fifth Circuit has interpreted section 1692e(10) in a manner inconsistent with this Court's mandate, inconsistent with the Sixth and Ninth Circuits, and inconsistent with the declared purpose of the Act

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[7] *Lewis* at 398-399.

itself, this Court should use its supervisory power to correct the Court of Appeals below.

III. The Court of Appeals, by Deciding That a Debt Collector Is Exposed to Penalties under 15 USC § 1692e(10) by Making a Settlement Offer of Less Than Full Authority Given by the Creditor to Resolve the Outstanding Debt, Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court

The Court of Appeals, by deciding that a collector is exposed to damages under the FDCPA by offering to resolve a debt for a discount for a limited period of time where the offer does not reflect the full authority given by a creditor, has decided an important question of federal law that has not been, but should be, decided by this Court.

A. The Court of Appeals Decision will Affect Interpretations of Other Provisions of the FDCPA

The FDCPA must be interpreted consistent with the purpose for which it was enacted, to "*eliminate abusive debt collection practices by debt collectors.*" 15 USC § 1692(e) Because of the attorney fee switching provisions of the FDCPA, consumer attorneys have created a cottage industry of filing suits loosely based on hypertechnical violations of the Act resulting from debt collector actions that are in no way abusive or coercive. The present case is no exception. The violation of cross petitioner was to offer a 30 percent discount available for 30 days on an uncontested debt when the creditor had authorized an even greater benefit. Now, according to Fifth Circuit interpretation of the FDCPA, ACEI is liable to Goswami for any actual damages, additional

damages and attorney fees she may be able to prove.[8] This interpretation distorts the purpose of the Act and such distortion will continue if not corrected by this Court.

Other areas of the Act state general prohibitory language that appear to go beyond the purpose of the Act. As the Sixth Circuit noted in *Lewis,* "While Congress appears to have intended the act to eliminate abusive collection practices, the language of section 1692c(c) is broader." However, unlike the Fifth Circuit, the Sixth Circuit properly looked to the purpose of the Act to determine that it is not in the best interest of the debtor, nor is it the purpose of the FDCPA, to punish offers that may lead to settlement as long as such offers are not coercive. In the case below, there were no penalties or negative repercussions in any way attributed to Goswami's decision not to accept the offer to discount her debt. The offer was without question available as stated, Goswami's decision not to accept it only put her back in the position where she started, namely owing the full amount.

If the Court does not settle the issue of whether provisions of the FDCPA should be interpreted in accordance with the purpose of the Act, then lower courts may continue to permit vexatious litigation resulting from actions that are not harmful, but only potentially a technical violation. The collection industry, although much maligned, is an important industry to the millions of businesses who suffer losses from bad check writers and the like. The collectors' activities are already controlled by both federal and state statutes designed to prevent abuses. Improperly expanding the purpose of the FDCPA to include collection activity which does not improperly threaten, abuse or cause harm unnecessarily

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[8] 15 USC § 1692k (civil liability).

restricts the ability of collectors to help creditors recover legitimate debts. Such interpretation does nothing to further the purpose of the Act, only frustrate it.

B. The Fifth Circuit's Broad Pronouncement Invades Attorney-Client Relationships

This Court has specifically held that the FDCPA applies to attorneys involved in litigation.[9] Therefore attorneys who practice in the Fifth Circuit must not make "false or misleading statements about the settlement authority [he] held from [the creditor] in the discount [he] was authorized to offer and the time within which [the debtor] was allowed to accept the offer."[10] Any attorney engaged in negotiation and who does not disclose his client's full authority runs the risk that he will be in violation of the FDCPA. An attorney must be a zealous advocate for a client and not continue cases where such zealous advocacy is compromised by a conflict of interest. The client will not be best served by an attorney who fears personal liability if a comment the attorney makes during negotiations about the settlement value of the case is construed as a misrepresentation of authority. According to the Fifth Circuit, to be sure to avoid a violation of the FDCPA the attorney should provide the client's highest and best offer immediately, otherwise run the risk that negotiation strategy will be construed as deceptive under 15 U.S.C. § 1692e(10). Such an approach would run contrary to the attorney's obligation to get the best result for the client.

It would not be unusual for an attorney in mediation or on the phone with opposing counsel, to suggest in making an

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[9] *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995).
[10] 377 F.3d at 496.

offer of settlement on his client's behalf "I think this is all we can do". Although the attorney may be posturing to get the greatest advantage for his client, if in fact the attorney knows the bottom line offer had not been made, this comment would be an FDCPA violation in the Fifth Circuit. The District Judge in this case recognized that ACEI was involved in negotiation and described the potentially absurd result of the Fifth Circuit's overbroad conclusion as follows: "If [Goswami's] position were correct, collection agencies -- and negotiations to settle debts – would be eliminated entirely. A negotiating position is not exactly a fact; it is a contingent fact, binding as fact only if it is accepted. Bidding low is not deceitful."[11] Since attorneys in litigation are debt collectors under *Heintz v. Jenkins*, then the Fifth Circuit has interpreted the FDCPA to create a conflict between attorneys and clients that cannot stand.

The undisputed facts of this case are that ACEI offered a reduction in Goswami's undisputed debt by 30% with a 30-day period during which no interest would accrue on her Visa. To interpret the FDCPA to suggest that this type collection activity is a violation exposes complying debt collectors for liability, damages and attorney's fees in lawsuits involving unrealistic or peculiar interpretations of collection letters. That goal was not intended by Congress and this Court should grant the Cross-Petition for writ to correct the incorrect statutory interpretation in this case which does not further the purpose of the Act.

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[11] 280 F. Supp. at 627

CONCLUSION

For the reasons stated above, Cross-Petitioner requests that the Court grant its Cross-Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
DEBT COLLECTION PRACTICES

15 USC § 1692

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 USC § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this.